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In The

# Supreme Court of the United States

SUNDANCE HOMES, INC., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

*Petitioners,*

v.

COUNTY OF DUPAGE, body corporate and politic, JOHN LOTUS NOVAK, Treasurer, GEORGE KOUBA, Finance Director, DONALD ZEILENGA, Director of Transportation, FIFIELD COMPANIES, INC., CAMBRIDGE HOMES, INC., CAMBRIDGE PROPERTIES, LEXINGTON HOMES, L.L.C., PRENTISS PROPERTIES ACQUISITION PARTNERS, L.P., KINGSPORT DEVELOPMENT, INC., STRATEGIC REALTY ADVISORS, INC., CATELLUS DEVELOPMENT CORPORATION, PLITT THEATERS, INC. and TOYS "R" US, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Illinois Supreme Court**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Supreme Court Rule 14 requires that a petition for writ of certiorari shall contain "[T]he questions presented for review, expressed concisely in relation to the circumstances of the case. . . . " The question presented by the Petitioners fails to comply with the Rule in that it does not relate to the time-bar issue that was the essence of the Illinois Supreme Court decision sought to be reviewed. Petitioners themselves recognize that the issue differs from what they have set out. In discussion they state "[T]he principal issue raised by this Petition for Writ of Certiorari is whether a person's constitutional right to a refund of monies taken under an unconstitutional revenue law can be restricted by the application of a general statute of limitations period. . . . " (Petition p. 16)

A proper statement of the question will allow the Court to determine whether to grant or deny the Petition. The County therefore presents this Court with the following question:

> WHETHER THE APPLICATION OF AN ILLINOIS STATUTE OF LIMITATIONS TO A CLAIM FOR REFUND OF MONIES PAID UNDER AN ILLINOIS STATUTE AND LOCAL COUNTY ORDINANCE THAT WERE PREVIOUSLY HELD TO BE UNCONSTITUTIONAL AMOUNTS TO AN UNCONSTITUTIONAL TAKING OR VIOLATION OF FEDERAL DUE PROCESS.

## PARTIES TO THE PROCEEDING

Respondents, County of Dupage, Illinois, John Lotus Novak, George Kouba and Donald Zeilenga, hereinafter referred to as "County", are the parties responding to the Petition for Writ of Certiorari.

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## STATEMENT OF THE CASE

Supreme Court Rule 15 states, "in addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." In compliance with this Rule, the County notes the following:

Petitioners suggest that "the government" caused a delay by the prosecution of appeals in *Northern Illinois Home Builders Assn., Inc. v. County of DuPage* (hereinafter referred to as *Northern*). (Petition p. 10) They use this suggestion as support for their argument that application of a time bar would be contrary to public policy in that it would encourage misconduct by public entities. As stated on page 6 of the Petition, without regard to the merits or relevance of that argument, the County notes that the Petitioners took the appeals in *Northern*.

Further, Petitioners omit the fact that in 1989, the class representative joined with several other commercial developers in filing a case styled *Homebuilders of Greater Chicago v. County of DuPage*. That case, although separate from the *Northern* case, similarly challenged the constitutionality of the impact fee statute and ordinances and sought a refund of fees paid. As the Illinois Supreme Court noted in its decision in this case, the *Homebuilders of Greater Chicago* suit was voluntarily dismissed by the developers in 1990. (Petitioners' Appendix p. 3) The Illinois Supreme Court also noted that the class representative, in paying fees for its developments between January 1, 1989 and July 25, 1990, submitted a separate writing

with each of its payments reciting that the payment was made under protest with a reservation of the right to make such a constitutional challenge. (Petitioners' Appendix p. 2)

Petitioners also state that the County's ordinance did not contain pre- or post-deprivation contest provisions. (Petition p. 15) In fact, there were several such provisions, and in the *Northern* case, the Illinois Supreme Court determined that "when the DuPage County ordinance is examined as a whole, it provides sufficient mechanisms whereby a fee payer may be meaningfully heard." *Northern Illinois Home Builders Assn., Inc. v. County of DuPage*, 165 Ill.2d 25, 45, 649 N.E.2d 384 (1995).

## REASONS FOR DENIAL OF THE PETITION

### A. PETITIONERS DID NOT PRESENT TO THE ILLINOIS SUPREME COURT THE QUESTION OF WHETHER THE ILLINOIS STATUTE OF LIMITATIONS IS REPUGNANT TO THE UNITED STATES CONSTITUTION, AND THEREFORE, THIS QUESTION IS WAIVED

Petitioners assert that jurisdiction lies under 28 U.S.C. § 1257(a). That statute provides that review may be had " . . . where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States. . . . " The County submits that Petitioners have failed to preserve the question of repugnancy because it was not squarely put to the Illinois courts. "At the minimum, however, there should be no doubt from the record

that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis in original).

Petitioners did not challenge the constitutionality of the statute of limitations in the Illinois trial court. Rather, they argued that the statute was inapplicable to an equitable claim, that accrual was later than the County contended for, and that tolling should apply. (Petition pp. 7-8) Petitioners admit that the Federal constitutional question was not raised until the case reached the Illinois Supreme Court. (Petition p. 9) Under Illinois law, the question of the constitutionality of applying the statute of limitations to a constitutional claim was waived. Issues not raised in the trial court are waived and cannot be raised for the first time on appeal. *Ragan v. Columbia Mut. Ins. Co.*, 183 Ill.2d 342, 355, 701 N.E.2d 493 (1998).

Moreover, Petitioners did not apprise the Illinois Supreme Court of the nature of their federal claim. The focus of Petitioner's Brief to the Illinois Supreme Court was on a constitutional violation occurring by reason of fees having been charged under an invalid ordinance. Petitioners sought only to have the *Northern* ruling applied to their claims. In the Petition for Leave to Appeal to the Illinois Supreme Court (Petitioners' Appendix p. 91), there was no mention of the statute of limitations. Rather, there was an assertion that an unconstitutional taking arose from the Appellate Court's decision, which Petitioners submitted had denied the effect of *Northern*. When the statute of limitations *was*

addressed by Petitioners (Petitioners' Appendix p. 92), it was not discussed in relation to the Federal Constitution, but rather was presented as a nullification of the Illinois Supreme Court's decision in *Northern*.

In their Brief to the Illinois Supreme Court, Petitioners maintained the focus on the unconstitutionality of the impact fee statute and ordinances. (Petitioners' Appendix pp. 132-135) They made cursory reference to the effect of the passage of time (Petitioners' Appendix p. 136), but returned immediately to the assertion that *Northern* "changed the law" and either created a new claim or removed an impediment to filing their claim, thereby triggering retroactivity. There was nothing in the written argument that would have notified the Illinois Supreme Court that Petitioners were challenging, under the Fifth Amendment to the United States Constitution, the constitutionality of the Illinois statute of limitations as applied to their refund claims. The asserted federal issue is not addressed in the Illinois Supreme Court decision. The issue, having been waived by Petitioners, cannot now serve as a basis for this Court to grant certiorari.

Additionally, Petitioners failed to satisfy the procedural requirements to make such an argument. Illinois court rules governing appeals provide that an Appellant's brief must include, "[I]n a case involving the construction or validity of a statute, constitutional provision, treaty, ordinance or regulation, the pertinent parts of the provision verbatim, with a citation of the place where it may be found, all under an appropriate heading, such as 'Statutes Involved'." Ill. S. Ct. R. 341(e)(5). The Illinois statute of limitations was not included in the section that

set forth the provisions relevant to the case presented to the Illinois Supreme Court. (Petitioners' Appendix pp. 126-7)

Because the issue was not fully and fairly presented below, Petitioners should not now be allowed to argue that the Illinois statute of limitations, as applied in this case, constitutes a taking or due process violation. This is especially true where in their Petition to this Court, they have again failed to identify the Illinois statute as being at issue.

## B. THE DECISION OF THE ILLINOIS SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND SHOULD NOT BE REVIEWED

As a jurisdictional matter, this Petition should not be granted because it seeks review of a judgment that rests on independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). There is a plain statement in the decision below to indicate that the Illinois Supreme Court's decision was not based on federal grounds. The court stated " . . . we find the appellants' action barred by the five-year statute of limitations set forth in section 13-205 of the Code of Civil Procedure. . . . " (Petitioners' Appendix p. 34) That statement alone suffices to militate against jurisdiction here. However, should this Court deem the Illinois Court's pronouncement in this regard as insufficient, a review of the decision below will clarify that no federal question was determined by the Illinois Supreme Court.

Although Petitioners assert that a federal question was presented below (Petition pp. 10-11), the Illinois Supreme Court rested its judgment on whether the passage of time could have an effect on the right to bring a claim for refund of unconstitutional fees. The Court determined that under Illinois law, the cause of action for a refund was one at law to which the Illinois five-year statute of limitations applied, and that the cause accrued when the fees were paid. State law governs these procedural matters.

Petitioners may believe that they raised a federal "takings" claim in their reliance on *Northern*. However, that belief is misguided since *Northern* itself was a case that applied Illinois rather than federal standards. However, even if Petitioners' underlying claim *was* based on a federal question, the decision below would still be on state grounds because the *ratio decidendi* was the time bar, which, under *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), was "borrowed" from the Illinois statute of limitations. Any federal question would not be reached because it would be barred under State procedural law. This is the meaning of the hypothetical language of *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754 (1995), where the Court said:

> "But what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity – a rule containing certain procedural requirements for any refund suit – nonetheless barred the taxpayers' refund suit? (Citations omitted.) Depending on whether or not this independent rule satisfied other provisions of the Constitution, it could independently

> bar the taxpayers' refund claim. (Citation omitted.)"

The decision below was properly made on the basis of the Illinois statute of limitations irrespective of whether Petitioners' underlying refund claim was supported by state or federal law.

The Illinois Supreme Court was also urged that if a statute of limitations were applicable, the time should not have begun to run upon payment of the fees, but should have been delayed until after a change in state law was announced in *Northern Illinois Home Builders Assn., Inc. v. County of DuPage*, 165 Ill.2d 25, 649 N.E.2d 384 (1995). It was properly within the province of Illinois' highest court to say whether or not there had been a change in the "specifically and uniquely attributable" and "direct and material benefit" standard that had been part of Illinois law since the early 1960's in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961). The Illinois Supreme Court rejected the premise that its decision in *Northern* had changed the law of *Pioneer* (Petitioners' Appendix at p. 27), and it declined to find the cause accrued at a time other than payment of the fees. At the same time, it also declined, under Illinois law, to give retroactive application to *Northern*. When a matter of state law (for example, whether impact fees were constitutional under the Illinois standard of *Pioneer*) is at issue, state courts have the authority to determine whether retroactive effect will be given to their own decisions. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177 (1990). The Court noted, however, that the issue of retroactivity was not controlling where the claim

was barred on statute of limitations grounds. (Petitioners' Appendix p. 25)

If any doubt remains that the decision below was based on Illinois grounds, the doubt may be resolved by looking to how the case was presented by Petitioners themselves. In their Petition for Leave to Appeal, it was argued that review by the Illinois Supreme Court was necessary in order to consider whether the Appellate Court's ruling conflicted with two prior Illinois cases, *Ross v. City of Geneva*, 71 Ill.2d 27, 373 N.E.2d 1342 (1978) and *Bd. of Police Pension Fund v. Village of Glen Ellyn*, 337 Ill.App. 183, 85 N.E.2d 473 (1949). In its consideration of this issue, the Illinois Supreme Court decided that there was no conflict and that no relaxed time bar was mandated because the facts of this case did not present the same considerations present in the earlier cases. Again, the Illinois Supreme Court made its decision as part of Illinois law.

The nature of a claim, the time it accrues, whether there has been a change in state law that would affect accrual, and whether the Appellate decision conflicts with other Illinois decisions are all state law questions. The decision of the Illinois Supreme Court answering those questions was made on the basis of adequate and independent State grounds. The Illinois Supreme Court cited extensively to Illinois cases in determining the question of accrual for purposes of statute of limitations. (Petitioners' Appendix pp. 9-11) Admittedly, federal cases were also discussed, but they were treated as analogous and instructive rather than controlling. (Petitioners' Appendix p. 10) The Court also reviewed Illinois cases

and statutes in its analysis of *laches* as a time bar. (Petitioners' Appendix pp. 15, 17) When it cited federal cases in this regard (Petitioners' Appendix p. 16), the Illinois Court did so by way of comparison, using the phrases "[t]he federal government, like Illinois . . . " and "[l]ike section 1611(a) of the Internal Revenue Code, our own state statutes of limitations. . . . " The Illinois Supreme Court also addressed the federal cases cited by Petitioners in support of their retroactivity argument, but concluded that the argument was irrelevant. Upon reaching that conclusion, the Illinois Supreme Court stated, "The sound reasoning of the United States Supreme Court in *James Beam Distilling Co.* expresses *our* view in this refund matter." (Petitioners' Appendix p. 25) (emphasis added). Clearly, the Illinois Supreme Court did not reach its result because it felt bound by federal precedent.

Because the decision below is based on independent and adequate state grounds, this Court should not grant review.

### C. PETITIONERS HAVE BEEN AFFORDED PROCEDURAL DUE PROCESS, AND THERE IS NO FACTUAL BASIS FOR A FEDERAL CLAIM

Petitioners assert, for the first time, that due process was denied because there were no pre- or post-deprivation procedures available to them. Petitioners never presented this argument to the Illinois Supreme Court, and for the reasons discussed above, the issue should not afford a basis for this Court to review the decision below.

However, even if the issue had been properly preserved, this Court should not grant review because the facts of the case do not compel a different decision than the one made by the Illinois Supreme Court.

If it were true that there were no meaningful remedies, Petitioners might be able to say under the *Reynoldsville dicta* that applying the Illinois statute of limitations did not satisfy other provisions of the Constitution. But the assertion is not wholly correct. It is true that the Highway Code contained no remedy scheme; it was a bare grant of power. However, as *Northern* shows, the County's ordinances *did* provide remedies, and those remedies were held in *Northern* to satisfy due process. *Northern Illinois Home Builders Assn. v. County of DuPage*, 165 Ill.2d 25, 45, 649 N.E.2d 384 (1995).

Moreover, in addition to having all the procedural safeguards in the ordinance, Petitioners had a post-deprivation remedy. As noted by the Illinois Supreme Court in its decision, persons paying impact fees had a legal remedy from the time they paid their fees; they were able to bring a suit for refund. (Petitioners' Appendix pp. 19-20) Illinois has, since at least 1917, recognized a cause of action for the return of fees paid under an unconstitutional law. In *Rath v. City of Chicago*, 207 Ill. App. 117 (1917), suit was filed for the recovery of occupational license fees that had been determined in another case to be unconstitutional. Plaintiff in *Rath* was allowed to recover on his timely claims, and barred on those brought beyond the applicable Illinois statute of limitations.

Petitioners were certainly aware of the procedure available to pursue their remedy. As noted in the

County's statement of facts, the class representative here, concurrently with the payment of its fees, reserved the right to bring a constitutional challenge. It then timely filed suit claiming a refund. However, for reasons best known to itself, it chose to abandon the claim before receiving its remedy. Having engaged in the process, Petitioners should not now be allowed to argue that there is no due process because there was no post-deprivation remedy available. The argument that no pre- or post-deprivation procedures were available is contradicted by Petitioners' actual experience.

Nor can Petitioners say that the post-deprivation remedy was inadequate because the procedure is constrained with time limits. The application of a statute of limitations to recovery on a constitutional claim is not a *per se* due process violation. *Stone Container Corp. v. U.S.*, 229 F.3d 1345, 1350 (Fed.Cir. 2000), citing *Block v. North Dakota*, 461 U.S. 273, 292 (1983) ("a constitutional claim can become time barred just as any other claim can"). This Court has acknowledged that a state may establish procedures for the orderly prosecution of post-deprivation claims. *McKesson Corp. v. Div. Of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 45 (1990). Petitioners have not explained to this Court, nor did they explain to the Illinois Supreme Court, exactly what is defective in the application of this particular state procedural requirement.

Due process, under both the Illinois and U.S. Constitutions, requires that one whose property is taken be given notice and a meaningful opportunity to be heard. Also included is the notion of a "clear and certain remedy". Here, the Petitioners knew they were being charged

an impact fee (notice), and they actually participated in the process of claiming a refund (opportunity). They could have received a refund (remedy) if they either had not abandoned the initial claim or if they had made a claim within five years of payment. Due process existed, but Petitioners did not avail themselves of it.

### D. PETITIONERS HAVE BEEN AFFORDED SUBSTANTIVE DUE PROCESS

In *Northern,* the Illinois Supreme Court declared that the County's initial impact fee ordinances were invalid because there was no guarantee that the funds collected would be used in such a way as to satisfy the "direct and material benefit" test of *Pioneer.* In this case, an uncontroverted affidavit was presented in response to a motion for summary judgment. The affidavit established that the hypothetical concerns voiced in *Northern* had not been realized, and that the fees in this case had actually been spent for Petitioners' benefit. This provision of a tangible return for the money paid would satisfy any need for a post-deprivation remedy. It would also meet the conditions necessary to avoid an unlawful taking.

There is nothing fundamentally unfair about the County retaining funds to cover a portion of the cost of road improvements constructed for the Petitioners, but Petitioners will be unjustly enriched if they are allowed to retain the benefits provided by the County. Petitioners have not, and on the facts of this case cannot, set out a case for relief, much less for review of the decision below.

## CONCLUSION

Petitioners have not met the jurisdictional requirements for review by writ of certiorari. Their argument that a statute of limitations cannot be applied to a constitutional claim is incorrect, and more importantly, it is waived. The decision they object to is one of purely Illinois law, and should not be reviewed. Finally, there is no federal due process issue on the facts of the case. Wherefore, the Respondents request that the petition for writ of certiorari be denied.

Dated this 6th day of August, 2001.

Respectfully submitted,

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